A **PP v. DARVIN RAJ GUNASELAN & ANOTHER APPEAL**

HIGH COURT MALAYA, MUAR
SURIA KUMAR DJ PAUL J
[CRIMINAL APPEAL NOS: JB-41LB-5-09-2023
& JB-41S-8-08-2023]
B 14 MARCH 2025

Abstract – *When a prosecution wishes to apply for a joint trial, it is for the prosecution to justify it. If the trial of two charges amounts to a misjoinder of charges, which can cause confusion, unfairness, uncertainty and embarrassment to the accused, this can result in an illegality, rendering the trial to be null and void.*

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D ***CRIMINAL PROCEDURE:*** *Charge – Misjoinder of charges – Whether trial of two charges together amounted to confusing issues – Whether there was unfairness, uncertainty and embarrassment to accused defending charges – Whether savoured oppression and abuse of process – Whether there was misjoinder – Whether resulted in illegality – Whether trial null and void – Whether proper to order retrial – Road Transport Act 1987, ss. 41(1) & 44(1)*

E ***CRIMINAL PROCEDURE:*** *Trial – Misjoinder of charges – Whether trial of two charges together amounted to confusing issues – Whether there was unfairness, uncertainty and embarrassment to accused defending charges – Whether savoured oppression and abuse of process – Whether there was misjoinder – Whether resulted in illegality – Whether trial null and void – Whether proper to order retrial – Road Transport Act 1987, ss. 41(1) & 44(1)*

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The accused was charged with two charges (i) under s. 41(1) of the Road Transport Act 1987 ('RTA'); and (ii) under s. 44(1) of the RTA. The accused was tried together on both charges by the Magistrate. When the matter came up for decision, the Deputy Public Prosecutor ('DPP') sought a withdrawal
G of the charge under s. 44(1) and for the accused to be granted a discharge not amounting to an acquittal. The reason put forward by the DPP was that there might be further instructions on the charge under s. 44(1) of the RTA in the near future. The accused objected to the DPP's request and submitted that the accused ought to be granted a discharge amounting to an acquittal on the
H ground that there had been a misjoinder of the charges from the onset of the proceeding when the charges were read to the accused. The accused further submitted that a grant of discharge not amounting to an acquittal would only be prejudicial to the defence at this stage and what the prosecution ought to do was to seek a discharge not amounting to an acquittal on both charges and decide to recharge the accused on either one of the charges. The DPP
I responded by submitting that under art. 145 of the Federal Constitution ('FC') read together with s. 254 of the Criminal Procedure Code ('CPC'), the prosecution had the right to withdraw the charges before the verdict was

delivered by the court. The Magistrate, upon hearing both parties, exercised her discretion and granted a discharge amounting to an acquittal to the accused as she was of the view that it was not fair for the prosecution to withdraw the charge under s. 44(1) of the RTA and to recharge the accused in the near future. Whereas on the charge under s. 41(1) of the RTA, the Magistrate found the accused failed to raise a reasonable doubt on the prosecution's case and that the prosecution had proved their case against the accused beyond a reasonable doubt. The accused was found guilty and convicted and was sentenced to three years imprisonment from the date of conviction and was fined RM8,000 in default, four months imprisonment. Dissatisfied with the decision on the conviction and sentence under s. 41(1) of the RTA, the accused appealed. Likewise, the DPP, dissatisfied with the decision of the Magistrate discharging and acquitting the accused for the charge under s. 44(1) of the RTA, appealed. Hence, these appeals. The issue that arose was whether there was a misjoinder of charges which was tried together before the Magistrate that resulted in the trial being a nullity.

Held (allowing appeals):

(1) The accused was charged with two separate charges for distinct offences purportedly arising out of the same transaction or 'on the same set of facts' and were tried together. Firstly, he was charged under s. 41(1) of the RTA and secondly under s. 44(1) of the RTA. Section 41(4) of the RTA provides that the court upon a trial of a person for an offence under this section, may convict such person of an offence under ss. 42 or 43 of the same Act. However, s. 41(4) of the RTA does not provide for any conviction under s. 44(1) that concerns driving under the influence of intoxicating liquor or drugs. (paras 37-41)

(2) Whether both the charges against the accused ought to have been tried together by the Magistrate was a question of fact to be determined upon the circumstances of each case. The introduction of the evidence relating to intoxicating liquor for the offence under s. 44(1) against the accused could cause unfairness, uncertainty and embarrassment to the accused defending the charge under s. 41(1). Further, it could cause unfairness, uncertainty and embarrassment to the accused on the standard of proof on which he needed to discharge his burden in defending the charges under ss. 41(1) and 44(1) tried together. This certainly savoured oppression and abuse of process. (paras 65 & 66)

(3) Although the two offences have a relationship of cause and effect but confusion could still arise. The misjoinder of charges amounted to confusing the issues, causing unfairness, uncertainty, and embarrassment to the accused. Further, the introduction of evidence relating to intoxicating liquor tended to show the accused guilty of some other offence. (paras 68-69)

(4) If the prosecution wished to apply for a joint trial, it was for the prosecution to justify it. A perusal of the notes of evidence when the charges were read to the accused or before the trial commenced in the court did not indicate an application was made by the prosecution for the charges under s. 41(1) and s. 44(1) of the RTA to be tried together. Thus, the trial of both charges together by the Magistrate amounted to a misjoinder, the failure of which had resulted in an illegality. A contravention of an express provision of the Criminal Procedure Code ('CPC') could not be cured as a matter of irregularity under s. 422 of the CPC. The trial before the Magistrate was null and void. (paras 70-74)

(5) The element of public interest must prevail and be given serious consideration in cases of road accident fatalities that seem to be increasing by the day due to careless and reckless drivers not having due or any regard to other road users. There are rampant cases involving drivers under the influence of alcohol or drugs involved in motor vehicle collisions. Two lives were lost in the present case. This court thus allowed the appeal by both parties. The conviction and sentence under s. 41(1) were set aside and the order of acquittal and discharge under s. 44(1) were also set aside. The accused was ordered to be retried before another Magistrate on the charges separately. (paras 84-87)

Case(s) referred to:

Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(refd)***
Ahmad Shah Yassin v. PP [1952] CLJU 6; [1952] 1 LNS 6 HC ***(refd)***
Cheong Sik Kwan v. PP [1959] CLJU 14; [1959] 1 LNS 14 ***(refd)***
Chin Choy v. PP [1955] CLJU 17; [1955] 1 LNS 17 HC ***(refd)***
Chuah Kooi Hoe v. PP [1960] CLJU 20; [1960] 1 LNS 20 HC ***(refd)***
Connelly v. Director Of Public Prosecutions [1964] 2 All ER 401 ***(refd)***
Jagar Singh v. PP [1936] CLJU 25; [1936] 1 LNS 25 HC ***(refd)***
Jayaraman & Ors v. PP [1979] CLJU 36; [1979] 1 LNS 36 HC ***(refd)***
Lim Meng See v. PP [1949] CLJU 41; [1949] 1 LNS 41 HC ***(refd)***
PP v. Leong Cheng Kong [2000] 3 CLJ 443 ***(refd)***
PP v. Lim Swee Guan [1968] CLJU 107; [1968] 1 LNS 107 HC ***(refd)***
PP v. Loh Ang Sing [1964] CLJU 145; [1964] 1 LNS 145 HC ***(refd)***
PP v. Ong Kok Tan [1969] CLJU 136; [1969] 1 LNS 136 HC ***(refd)***
PP v. Yuvaraj [1968] CLJU 116; [1968] 1 LNS 116 ***(refd)***
Rex v. Sakandar Khan [1939] CLJU 99; [1939] 1 LNS 99 HC ***(refd)***
Rozi Ramli v. PP [1997] 3 CLJ Supp 479 HC ***(refd)***
Sam Ke Ting lwn. PP [2023] 5 CLJ 704 CA ***(refd)***
Sebastiano Robert Pavone v. PP & Another Case [1983] 2 CLJ 225; [1983] CLJ (Rep) 855 HC ***(refd)***
Shaafie Saibi v. PP [2009] 3 CLJ 364 CA ***(refd)***
Subramaniam & Anor v. PP [1975] CLJU 169; [1975] 1 LNS 169 HC ***(refd)***
Wee Hui Hoo v. PP [1985] CLJU 6; [1985] 1 LNS 6 HC ***(refd)***
Yap Liow Swee v. PP [1937] CLJU 93; [1937] 1 LNS 93 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 164, 165, 166, 170, 254, 422
Federal Constitution, art. 145
Road Transport Act 1987, ss. 41(1), (4), 42, 43, 44(1), 45(a), (b), 45B, 45F(1), 45G

For the accused - S Paul Krishnaraja & Amy Chong Chai Ling; M/s Paul, Amy Chong & Assocs
For the prosecution - Nur Sulehan Abd Rahman; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Suria Kumar DJ Paul J:

Introduction

[1] There are two appeals before me. One by the Public Prosecutor on the discharge and acquittal of the accused on the charge under s. 44(1) of the Road Transport Act 1987 (RTA 1987).

[2] The other is by the accused on the conviction and sentence on the charge under s. 41(1) of the RTA 1987.

[3] Both appeals were heard together.

[4] At the onset of the hearing, learned counsel for the accused and learned Deputy Public Prosecutor had a common ground. Both agreed that there is an important point that this court must decide before going into the merits of their respective appeal.

[5] This point concerns whether the trial in the court below was a nullity due to a misjoinder of charges and the accused was tried together on both charges.

Background Facts

[6] In the court below, two charges were preferred against the accused.

[7] The first charge was under s. 41(1) of the RTA 1987 and the second charge was under s. 44(1) of the RTA 1987.

[8] Both charges were registered under one case number, *ie*, JE-83-147-10-2020.

[9] The accused was tried together on both charges by the learned Magistrate. It was tried and concluded before three different Magistrates.

[10] At the end of the prosecution's case, the third Magistrate called for the accused to enter his defence on both charges.

[11] The accused elected to testify on oath and he was the sole witness for his defence.

[12] Upon the close of the defence case, the learned Magistrate directed parties to file written submissions and fixed the matter for decision.

[13] When the matter came up for decision, learned Deputy Public Prosecutor in the court below informed the learned Magistrate that she had been instructed by the Head of Prosecutions for the State of Johor to seek a withdrawal of the charge under s. 44(1) and the accused be granted a discharge not amounting to an acquittal. The reason put forward by learned Deputy Public Prosecutor was that there might be further instructions on the charge under s. 44(1) of the RTA 1987 in the near future.

[14] Whereas learned counsel for the accused objected to the Deputy Public Prosecutor's request that the accused be granted a discharge not amounting to an acquittal. He submitted that the accused ought to be granted a discharge amounting to an acquittal on the ground that he believes there has been a misjoinder of the charges from the onset of the proceeding when the charges were read to the accused.

[15] Learned counsel for the accused further submitted that a grant of discharge not amounting to an acquittal would only be prejudicial to the defence at this stage and what the prosecution ought to do is to seek a discharge not amounting to an acquittal on both charges and decide to recharge the accused on either one of the charges. According to him, it is too late in the day now for the prosecution to seek a discharge not amounting to an acquittal because if the charges were improperly preferred against the accused from the onset, the objective of the charge giving notice to the accused person was not met.

[16] Learned Deputy Public Prosecutor responded by submitting that under art. 145 of the Federal Constitution read together with s. 254 of the Criminal Procedure Code, the prosecution has the right to withdraw the charges before the verdict is delivered by the court. She further submitted that the prosecution still intends to proceed with the charge under s. 44(1) of the RTA 1987 in the near future.

[17] Upon hearing both parties, the learned Magistrate exercised her discretion and granted a discharge amounting to an acquittal to the accused. She reasoned that both parties had closed their case and the matter was fixed for decision. She was of the view that it is not fair for the prosecution to withdraw the charge under s. 44(1) of the RTA 1987 and to recharge the accused in the near future.

[18] Whereas on the charge under s. 41(1) of the RTA 1987, the learned Magistrate found the accused failed to raise a reasonable doubt on the prosecution's case and the prosecution had proven their case against the accused beyond a reasonable doubt. She then found the accused guilty and convicted him.

[19] Upon hearing the plea of mitigation on behalf of the accused and the submissions on the aggravating factor from learned Deputy Public Prosecutor, the learned Magistrate sentenced the accused to three years imprisonment from the date of conviction and fined him RM8,000 in default, four months imprisonment. She also further disqualified the accused from obtaining a driving license for a period of three years from the date of conviction.

[20] The accused, dissatisfied with the decision on the conviction and sentence under s. 41(1) of the RTA 1987, appealed to this court.

[21] Likewise, learned Deputy Public Prosecutor, dissatisfied with the decision of the learned Magistrate discharging and acquitting the accused for the charge under s. 44(1) of the RTA 1987, appealed to this court.

Analysis And Finding

[22] As I have said earlier, the pertinent issue which needs to be decided in both appeals is whether there is a misjoinder of charges which was tried together before the learned Magistrate that resulted in the trial being a nullity.

[23] On this issue, the learned Magistrate was of the view that it had become academic, given that the charge under s. 44(1) of the RTA 1987 was withdrawn by the prosecution before the court delivered its verdict.

[24] I will now proceed to analyse whether there has been a misjoinder of charges proffered against the accused.

[25] Section 41 of the RTA 1987 reads:

> **41 Causing death by reckless or dangerous driving**
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> (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall be guilty of an offence and shall on conviction be punished with imprisonment for a term of not less than five years and not more than ten years and a fine of not less than twenty thousand ringgit and not more than fifty thousand ringgit and, in the case of a second or subsequent conviction, with imprisonment for a term of not less than ten years and not more than fifteen years and a fine of not less than fifty thousand ringgit and not more than one hundred thousand ringgit.
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> (2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under this section shall be disqualified from holding or obtaining a driving licence for a period of not less than five years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

(3A) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

(4) The court may upon the trial of a person for an offence under this section convict such person of an offence under section 42 or section 43.

(5) Notwithstanding anything in any written law for the time being in force, the court before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect:

(a) until the court makes a final decision on the charge; and

(b) as if the suspension is the suspension referred to in section 32.

(5A) If the driving licence of the person referred to in subsection (5) is incorporated in a multipurpose electronic card or device, the order of the court under that subsection shall be deemed to have been complied with if the particulars of the order are included in the database maintained by or on behalf of the Director General of driving licences granted under this Act and holders of such driving licences.

(5B) Notwithstanding subsection (5A), the Director may direct the person referred to in subsection (5) to surrender, within such period as the Director may specify, the multipurpose electronic card or device in which the driving licence is incorporated to him, or to a road transport officer authorised in writing in that behalf by the Director General, for the inclusion in the data stored in the card or device the particulars of the order of the court made under subsection (5) and the Director or such authorised officer shall, after such inclusion, immediately return the card or device to the person.

[26] Whereas s. 44 of the RTA 1987 reads:

44 Driving while under the influence of intoxicating liquor or drugs

Any person who, when driving a motor vehicle on a road or other public place:

(a) is under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the motor vehicle; or

(b) has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit,

and causes the death of any person shall be guilty of an offence and shall, on conviction, be punished with imprisonment for a term of not less than ten years and not more than fifteen years and a fine of not less than fifty thousand ringgit and not more than one hundred thousand ringgit and, in the case of a second or subsequent conviction, with imprisonment for a term of not less than fifteen years and not more than twenty years and a fine of not less than one hundred thousand ringgit and not more than one hundred and fifty thousand ringgit.

(1A) Any person who, when driving a motor vehicle on a road or other public place:

(a) is under the influence of intoxicating liquor or drug, to such an extent as to be incapable of having proper control of the motor vehicle; or

(b) has so much alcohol in his body that the proportion of it in his breath, blood or urine exceeds the prescribed limit,

and causes injury to any person shall be guilty of an offence and shall, on conviction, be punished with imprisonment for a term of not less than seven years and not more than ten years and a fine of not less than thirty thousand ringgit and not more than fifty thousand ringgit and, in the case of a second or subsequent conviction, with imprisonment for a term of not less than ten years and not more than fifteen years and a fine of not less than fifty thousand ringgit and not more than one hundred thousand ringgit.

(2) The court shall order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.

(3) A person convicted under subsection (1) shall be disqualified from holding or obtaining a driving licence for a period of not less than ten years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of twenty years from the date of the conviction.

(3A) A person convicted under subsection (1A) shall be disqualified from holding or obtaining a driving licence for a period of not less than seven years from the date of the conviction and, in the case of a second or subsequent conviction, be disqualified for a period of ten years from the date of the conviction.

(4) Notwithstanding subsection (1) and (1A), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall thereupon revoke his driving licence.

(5) Notwithstanding anything in any written law for the time being in force, the court before which a person is charged with an offence under this section shall order the immediate confiscation of the driving licence of that person and shall order the suspension of the licence commencing from the date the charge is first read to that person and such suspension shall have effect:

A (a) until the court makes a final decision on the charge; and

(b) as if the suspension is the suspension referred to in section 32.

(5A) If the driving licence of the person referred to in subsection (5) is incorporated in a multipurpose electronic card or device, the order of the court under that subsection shall be deemed to have been complied with B if the particulars of the order are included in the database maintained by or on behalf of the Director General of driving licences granted under this Act and holders of such driving licences.

(5B) Notwithstanding subsection (5A), the Director may direct the person referred to in subsection (5) to surrender, within such period as the C Director may specify, the multipurpose electronic card or device in which the driving licence is incorporated to him, or to a road transport officer authorised in writing in that behalf by the Director General, for the inclusion in the data stored in the card or device the particulars of the order of the court made under subsection (5) and the Director or such authorised officer shall, after such inclusion, immediately return the card D or device to the person.

[27] Section 163 of the Criminal Procedure Code (CPC) provides that for every distinct offence, there shall be a separate charge and every charge shall be tried separately except in the case mentioned in ss. 164, 165, 166 and 170.

E **[28]** These provisions were succinctly explained by Harun J (as he then was) in *Jayaraman & Ors v. PP* [1979] CLJU 36; [1979] 1 LNS 36 as follows:

The general rule is that every accused person should be charged and tried separately for every distinct offence: s. 163 CPC. This general rule, however, is subject to four exceptions, *viz.*:

F (i) Not more than three offences of the same kind committed within the space of 12 months may be tried together: s. 164 CPC.

(ii) One trial for all offences committed by the same person arising out of the same transaction. There is no limit as to the number of charges that may be preferred against an accused person at such G trial: s. 165 CPC.

(iii) Where on the same set of facts several offences are disclosed and it is doubtful which particular offence to charge; the accused may be charged with all the offences disclosed or in the alternative for every such offence. There is no limit to the number of charges: s. 166 CPC.

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(iv) Where several accused persons commit the same offence or several offences of the same kind or different offences in the same transaction, then all the accused persons can be charged with committing all the offences at the same trial. Here again there is no limit to the number of charges: s. 170 CPC.

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[29] It was also similarly explained by Laville J sitting in Muar High Court in *Lim Meng See v. PP* [1949] CLJU 41; [1949] 1 LNS 41. A

[30] For this appeal, only ss. 165 and 166 of the CPC are relevant.

[31] In my humble opinion, upon carefully reading the two charges preferred against the accused, they represent two distinct offences. B

[32] In my judgment, the definition "out of the same transaction" in s. 165 of the CPC and "on the same set of facts" in s. 166 of the CPC cannot be literally applied to the offences the accused is charged with because it would create an absurdity.

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[33] Henceforth, the decided cases on whether a number of acts do or do not form the same transaction by determining whether the elements such as proximity of time, unity and proximity of place, continuity of action, unity of purpose and design exist do not assist the court in the present case.

[34] The authorities cited by learned counsel for the accused dealt with cases of separate offences combined in a single charge. It concerns the issue relating to the duplicity of charges. For instance, in the case of *Jagar Singh v. PP* [1936] CLJU 25; [1936] 1 LNS 25; [1936] 1 MLRH 222, the charge was framed against the accused for "driving the car recklessly without regard to the safety and comfort for convenience of other persons using the road" under the Motor Vehicles Enactment instead of separate charges for each of the distinct offence. D E

[35] Similarly, in the case of *Yap Liow Swee v. PP* [1937] CLJU 93; [1937] 1 LNS 93; [1937] 1 MLRH 468, the charge against the accused contained four distinct offences under the Motor Vehicles Enactment. Please also see *Wee Hui Hoo v. PP* [1985] CLJU 6; [1985] 1 LNS 6, where His Lordship Chong Siew Fai made a similar observation for a charge under the Road Traffic Ordinance 1960 that contained two distinct offences. F

[36] Finally, in *Sam Ke Ting lwn. PP* [2023] 5 CLJ 704, the Court of Appeal found the charge against the accused to contain two distinct offences under s. 41(1) of the RTA 1987 that were prohibited by s. 163 of the CPC. G

[37] But the present case is not the same. The accused was charged with two separate charges for distinct offences purportedly arising "out of the same transaction" or "on the same set of facts" and were tried together.

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[38] In other words, the facts were interrelated and the accused was tried together for two distinct offences.

[39] Firstly, he was charged under s. 41(1) of the RTA 1987 and secondly under s. 44(1) of the RTA 1987.

[40] It is important to take note that s. 41(4) of the RTA 1987 provides that the court, upon a trial of a person for an offence under this section, may convict such person of an offence under ss. 42 or 43 of the same Act. I

[41] However, s. 41(4) of the RTA 1987 does not provide for any conviction under s. 44(1) that concerns driving under the influence of intoxicating liquor or drugs.

[42] Section 41(1) concerns any person who, by driving a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person.

[43] Whereas s. 42 concerns any person driving a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is dangerous to the public.

[44] Finally, s. 43 concerns any person driving a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road.

[45] A close analysis of ss. 41, 42 and 43 of the RTA 1987 indicate that it cannot be ruled out that there can be similarity in the evidence adduced to prove either of these offences against an accused.

[46] Hence, the draftsmen must have thought it was therefore only appropriate to include a provision under s. 41(4) for the court upon a trial of a person for an offence under this s. 41(1), may convict such person of an offence under ss. 42 or 43.

[47] However, the same cannot be said for s. 44(1), for which the second charge was preferred against the accused. The application of this section is governed by ss. 45F and 45G of the RTA 1987.

[48] Section 45F is a specific provision which governs the admissibility of evidence involving intoxicating liquor for the offence under ss. 44 and 45. It reads:

> **45F Evidence in proceedings for an offence under sections 44 and 45 involving intoxicating liquor and section 45A**
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> (1) In proceedings for an offence under section 44 or 45 involving intoxicating liquor or in proceedings for an offence under section 45A, evidence of the proportion of alcohol in a specimen of breath, blood or urine provided by the accused shall be taken into account and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but the assumption shall not be made if the accused proves:

(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and

(b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings are for an offence under section 44 or 45 involving intoxicating liquor, would not have been such as to make him incapable of having proper control of the vehicle.

(2) Evidence of the proportion of alcohol in a specimen of breath, blood or urine may, subject to subsections (4) and (5), be given by the production of a document or documents purporting to be either:

(a) a statement automatically produced by a prescribed breath analyser and a certificate signed by a police officer (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the accused at the date and time shown in the statement; or

(b) a certificate signed by a government medical practitioner or government chemist as to the proportion of alcohol found in a specimen of blood or urine identified in the certificate.

(3) A specimen of blood shall be disregarded unless it was taken from the accused by a government medical officer; and evidence that a specimen of blood was so taken may be given by the production of a document purporting to certify that fact and signed by a government medical officer.

(4) A document purporting to be such a statement or such a certificate, or both, as is mentioned in subsection (2) is admissible in evidence on behalf of the prosecution in pursuance of this section only if a copy of it either has been handed to the accused when the document was produced or has been served on him not later than seven days before the hearing, and any other document is so admissible only if a copy of it has been served on the accused not later than seven days before the hearing; but a document purporting to be a certificate (or so much of a document as purports to be a certificate) is not so admissible if the accused, not later than three days before the hearing or within such further time as the court may in special circumstances allow, has served notice on the prosecution requiring the attendance at the hearing of the person by whom the document purports to be signed.

(5) Where, at the time a specimen of blood or urine was provided by the accused, he asked to be supplied with such a specimen, evidence of the proportion of alcohol in the specimen is not admissible on behalf of the prosecution unless:

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(a) the specimen in which the alcohol was found is one of two parts into which the specimen provided by the accused was divided at the time it was provided; and

(b) the other part was supplied to the accused.

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(6) A copy of a certificate required by this section to be served on the accused or a notice required by this section to be served on the prosecution may be served personally or sent by registered post.

[49] Section 45G is the interpretation section for ss. 44, 45B and 45F of the RTA 1987. This section reads:

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45G Interpretation of sections 44 and 45B to 45F

(1) For the purposes of sections 44 and 45B to 45F:

"breath test" includes a preliminary test for the purpose of obtaining, by means of a prescribed breath analyser, an indication

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whether the proportion of alcohol in a person's breath, blood or urine equals or exceeds the prescribed limit;

"fail" includes refuse;

"police station" includes any place or conveyance authorized or appointed by the Inspector General of Police to be used as a police

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station;

"prescribed limit" means:

(a) 22 microgrammes of alcohol in 100 millilitres of breath;

(b) 50 milligrammes of alcohol in 100 millilitres of blood; or

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(c) 67 milligrammes of alcohol in 100 millilitres of urine.

(2) A person does not provide a specimen of breath for a breath test or for analysis unless the specimen is sufficient to enable the test or the analysis to be carried out and provided in such a way as to enable the objective of the test or analysis to be satisfactorily

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achieved.

(3) (Deleted by Act A1065: s. 17)

[50] I find ss. 41, 42 and 43 are not dependent on ss. 45F and 45G. In other words, ss. 45F and 45G do not apply to ss. 41, 42 and 43.

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[51] Section 45F(1) provides that a presumption can be invoked against an accused person that the proportion of alcohol in his breath, blood and urine at the time of the alleged offence was not less than in his specimen.

[52] In *Abdullah Atan v. PP & Other Appeals* [2020] 9 CLJ 151, the Federal Court explained the use of presumptions in criminal cases. According to Her

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Ladyship Tengku Maimun (Chief Justice):

[46] Indeed, a presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved, as supported by the following authorities:

> A presumption has no probative value and is not evidence, being nothing more than a rule of law which assists a party in making out a *prima facie* case (see Michigan Law Review, "*Presumptions as Evidence in Criminal Cases*" at 504);
>
> Presumptions are a special mode of proving facts which must otherwise be proved by evidence. Where there is direct evidence to prove the presumed facts, the presumptions do not need to be applied (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649 at 668).

[47] Presumptions of fact and law operate in every legal system. The use of presumptions has always been standard judicial practice.

[53] Section 45F(1) also further provides that the presumption is rebuttable by the accused, proving the conditions in paras. (a) and (b) of sub-s. (1). It is a trite law that if a rebuttable presumption is invoked against an accused person, he has the burden to rebut the same on the standard of balance of probabilities. Please see the judgement of Lord Diplock in *PP v. Yuvaraj* [1968] CLJU 116; [1968] 1 LNS 116; [1969] 2 MLJ 89.

[54] Whereas for the charge under s. 41(1), the accused only needs to raise a reasonable doubt on the prosecution's case, failing which the court can convict the accused under ss. 41 or 42 or 43 of the Act.

[55] Next s. 165 of the CPC provides that if in one series of acts so connected together as to form the same transaction, the accused may be charged with and tried at one trial for more offence than one committed by him.

[56] In my opinion, the use of the word "may" in this section connotes that the court retains the residuary discretion to determine whether an accused can be charged and tried together for more than one offence.

[57] Therefore, in my judgment, whether both the charges against the accused ought to have been tried together by the learned Magistrate is a question of fact to be determined upon the circumstances of each case.

[58] In arriving at this conclusion, I am guided by the decision in *PP v. Ong Kok Tan* [1969] CLJU 136; [1969] 1 LNS 136, wherein the Federal Court dealt with the applicability of s. 175 of the Straits Settlement Criminal Procedure Code, which is equipollent to s. 164 of the CPC of the Malay State. The said s. 175 read:

> 175 (1) if in one series of acts so connected together as to form the same transaction more offences than one are committed by the some person, he may be charged with and tried at one trial for every such offence.

A (6) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined of punished, the person accuse of them may be charged with and tried at one trial for each of such offences.

[59] The Federal Court in *Ong Kok Tan* (*supra*) referred to the views by the
B House of Lords in *Connelly v. Director Of Public Prosecutions* [1964] 2 All ER 401 to conclude whether to allow joinder or not, the paramount consideration would be that whether any order allowing or refusing a joinder should only be made after consideration of whether such order would prejudice or embarrass the defence.

C **[60]** The Federal Court in *Ong Kok Tan* (*supra*) also recognised the views of the House of Lords in *Connelly* (*supra*) that there must always be a residual discretion retained by the courts to prevent anything which savours abuse of process.

[61] The relevant parts of the House of Lords decision in *Connelly* (*supra*)
D cited by the Federal Court are produced below:

> In this connection we would refer to the views expressed by the House of Lords in *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401. The facts of that case are that, arising out of an armed robbery, two indictments were preferred against the appellant, the first charging him
> E with murder and the second charging him with robbery. Because of the rule of practice enunciated in *R v. Jones* [1918] 1 FB 416 it was not permissible to include both charges in one indictment and the two indictments could not be tried together. At the trial of the first indictment for murder the appellant was found guilty but, the conviction was set aside by the Court of Criminal Appeal on the ground of misdirection.
>
> F
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> The Court subsequently gave leave to proceed with the second indictment. When that indictment came on for trial the trial Judge directed the jury to reject a plea of *autrefois acquit* but indicated that, if he had a discretion, he would have stayed the second indictment on the ground that it involved a retrial of the issue of identity decided in the
> G appellant's favour on the first indictment. The trial later proceeded before a different Judge who also rejected a plea of autrefois acquit. Appellant was convicted and his appeal finally came before the House of Lords which dismissed the appeal.
>
> Lord Reid (after referring to the practice baded on *R v. Jones supra*) stated:
>
> H *I think the present practice is inconvenient and ought to be changed. I realise that there are cases where for one reason or another it would be unfair to the accused to combine certain charges in one indictment. So the general rule must be that the prosecutor should combine in one indictment all charges which he intends to prefer; but in a case where it would have been improper to combine the charges in that way,* or where the accused has accepted
> I without demur the prosecutor's failure so to combine the charges, a second indictment is allowable. That will avoid any general

> question as to the extent of the discretion of the Court to prevent a trial from taking place; *but I think that there must always be a residual discretion to prevent anything which savours of abuse of process.*

Lord Morris of Borth-y-Gest at p. 409 has this to say:

> It is however, clear that in framing two indictments against the appellant in the present case, the prosecution were not at fault and were only doing what they were obliged to do. While as I will endeavour to show, there has never been a rule that some facts may not form a basis of successive charges, *there is inherent in our criminal administration policy and tradition that even in a case of wrongdoers there must be an avoidance of anything that savours of oppression.*

I now quote the headnote:

> The Court has discretion (outside the strict limits of a plea of *autrefois acquit* of autrefois convict) to stay, and in general should stay, a subsequent indictment containing charges founded on the same facts as those on which a previous indictment is based on one incident. The general rule, accordingly must be that charges which may be joined in an indictment in accordance with r. 3 of Sch 1 to the Indictments Act 1915 should be so joined, *but the Court retains a discretion in special circumstances not to apply the general rule thus ensuring that there is no abuse of its process;* the exceptional rule of practice, wherby no other count should be joined in an indictment with a count for murderor manslaughter (see *R v. Jones* [1918] 1 KB 416 and *R v. Large* [1939] 1 All ER 753) should no longer have effect as a rigid rule to be applied irrespective of prejudice or embarrassment to the defence, the defendant being able to apply for separate trials if he so wishes. (emphasis added)

Please also see *Cheong Sik Kwan v. PP* [1959] CLJU 14; [1959] 1 LNS 14.

[62] In *PP v. Loh Ang Sing* [1964] CLJU 145; [1964] 1 LNS 145, Lee Hun Hoe J (as he then was), faced with a situation of whether two accused should be tried separately as the offences were committed at different times and different places, commented as follows:

> *Even though an offence or offences are committed in the same transaction it is still a matter for the presiding Magistrate to decide whether accused should be tried together or separately. How he is going to exercise his discretion must necessarily depend on the facts of each case. The discretion must of course be exercised judiciously.* (emphasis added)

[63] In *Jayaraman & Ors v. PP* (*supra*), Harun J was of the view that the discretionary power to order whether the charges should be heard jointly or separately is that of the court and not of the prosecution.

[64] In *Chin Choy v. PP* [1955] CLJU 17; [1955] 1 LNS 17, the High Court recognised that it is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the

same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are the proximity of time, unity or proximity of place continuity of action and community of purpose or design.

[65] In my judgment, surely the introduction of the evidence relating to intoxicating liquor for the offence under s. 44(1) against the accused can cause unfairness, uncertainty and embarrassment to the accused defending the charge under s. 41(1).

[66] Further, it can cause unfairness, uncertainty and embarrassment to the accused on the standard of proof on which he needs to discharge his burden in defending the charges under ss. 41(1) and 44(1) tried together.

[67] This certainly savours oppression and abuse of process as stated by the House of Lords in *Connelly* (*supra*).

[68] Furthermore, although the two offences in the present case have a relationship of cause and effect but still confusion can still arise for the above-stated reasons. Unlike in *Rex v. Sakandar Khan* [1939] CLJU 99; [1939] 1 LNS 99 where McElwaine J found the evidence for the offence fabricating or destroying evidence will supply the nexus or show the relationship of cause and effect with the second offence of intended to conceal and show them to form part of the same transaction.

[69] In the foregoing, it is my finding that the misjoinder of charges amounted to confusing the issues, causing unfairness, uncertainty, and embarrassment to the accused. Further, the introduction of evidence relating to intoxicating liquor tends to show the accused guilty of some other offence. It savours oppression as described by the House of Lords in *Connelly* (*supra*) and referred to by the Federal Court in *PP v. Ong Kok Tan* [1969] CLJU 136; [1969] 1 LNS 136.

[70] Further, in my opinion, if the prosecution wishes to apply for a joint trial, it is for the prosecution to justify it. In *PP v. Loh Ang Sing* [1964] CLJU 145; [1964] 1 LNS 145, Lee Hun Hoe (as he then was) stated as follows:

> In my opinion in so far as this reference is concerned the learned Magistrate had exercised his discretion properly and was right in refusing to hear the two accused together as the prosecution had not produced any good reasons to satisfy him why there should be a joint trial. *If the prosecution wishes to apply for joint trial it is for the prosecution to justify it. The prosecution has all the facts and should have little difficulty in making out a good case for a joint trial.* Even though an offence or offences are committed in the same transaction it is still a matter for the presiding Magistrate to decide whether accused should be tried together or separately. How he is going to exercise his discretion must necessarily depend on the facts of each case. The discretion must of course be exercised judiciously.
>
> (emphasis added)

[71] Reverting to the facts in the present case, a perusal of the notes of evidence when the charges were read to the accused or before the trial commenced in the court below does not indicate an application was made by the prosecution for the charges under s. 41(1) and 44(1) of the RTA 1987 to be tried together.

[72] The learned Magistrate ought to have at the onset when the accused was called to plead, examined critically the charges. In *Ahmad Shah Yassin v. PP* [1952] CLJU 6; [1952] 1 LNS 6, Taylor J was of the following view:

> *On the general question, I would observe that while it is clearly the duty of those in charge of prosecutions, to guard against misjoinder and other errors in charges, it is also the duty of Presidents and Magistrates to examine all charges critically before calling on the accused to plead and to rectify errors at the earliest opportunity*.
> (emphasis added)

[73] In my judgment, the trial of both charges together by the learned Magistrate amounts to a misjoinder, the failure of which has resulted in an illegality. It is a trite law that a contravention of an express provision of the Criminal Procedure Code cannot be cured as a matter of irregularity under s. 422 of the Code.

[74] The trial before the learned Magistrate is null and void. In *Subramaniam & Anor v. PP* [1975] CLJU 169; [1975] 1 LNS 169, Ajaib Singh J (as he then was) stated as follows:

> The framing of the charges in this case and the subsequent conduct of the proceedings in Court left much to be desired. The administration of criminal law is not to be treated light-heartedly but is to be carried out seriously with a sense of dedication and with great care and attention.

Whether It Is Proper To Order A Retrial

[75] Lastly, I have to consider whether a retrial should be ordered.

[76] In *Shaafie Saibi v. PP* [2009] 3 CLJ 364, the Court of Appeal held that the failure of the accused tried separately on the two charges resulted in an illegality and the trial to be null and void. However, the court did not order a retrial due to the charges being defective as a result of the vagueness of the particulars and left it to the Public Prosecutor to exercise his discretion to charge the accused afresh.

[77] In *PP v. Lim Swee Guan* [1968] CLJU 107; [1968] 1 LNS 107, His Lordship HS Ong J (as he then was), in a case where the charge was wrong and directly contravened an express statutory provision found it had vitiated the trial and the effect to be a nullity. His Lordship then set aside the conviction and ordered a retrial before the same or another President.

[78] In *PP v. Leong Cheng Kong* [2000] 3 CLJ 443, His Lordship Richard Malanjum J (as he then was), on whether a court should order a retrial in criminal proceedings, set out the factors to be considered as follows:

A [2] Whether a court should order a retrial is a matter of discretion, taking into account factors such as the interests of justice, history of the case, prejudice to the defendant and the evidence adduced.

[3] A retrial is generally ordered where a fundamental defect in the proceedings has rendered the trial a nullity. It will not be ordered B where the prosecution has failed to present its case properly. With hindsight, the appropriate course the court should have taken in the first appeal was to order a retrial, as the misdirection was so serious that it could not be cured by s. 422 of the CPC.

[79] Whereas in *Rozi Ramli v. PP* [1997] 3 CLJ Supp 479, His Lordship C Suriyadi Halim Omar J (as he then was) held as follows:

[3] Any finding of guilt and conviction obtained in contravention of the strict and mandatory rules prescribed by the Criminal Procedure Code and which requires strict adherence, could not be sustained.

[80] However, in *Chuah Kooi Hoe v. PP* [1960] CLJU 20; [1960] 1 LNS 20; D [1960] 1 MLRH 167, Hepworth J did not order a retrial although he found the trial of the two charges against the accused tried together to be an illegality based on the peculiar facts in that case. Upon reviewing the evidence and the amended date of the offence on the charge, His Lordship was of the view on the face of it that something was seriously wrong E somewhere.

[81] Finally, in *Wee Hui Hoo v. PP* (*supra*), a case concerning the duplicity of charges for an offence under the Road Traffic Ordinance, a retrial was ordered.

F **[82]** In the present case, the accused was found guilty of the charge under s. 41(1) but discharged and acquitted of the charge under s. 44(1) based on the same evidence adduced by the prosecution in one trial.

[83] In *Sebastiano Robert Pavone v. PP & Another Case* [1983] 2 CLJ 225; [1983] CLJ (Rep) 855, Edgar Joseph Jr J (as he then was) considered the G element of public interest in combatting the drug menace as a national security problem in deciding whether to order a retrial. His Lordship then ordered a retrial.

[84] In my judgment, upon considering the above-quoted authorities and the facts in the present case, the element of public interest must prevail and H be given serious consideration in cases of road accident fatalities that seem to be increasing by the day due to careless and reckless drivers not having due or any regard to other road users.

[85] Many lives are lost daily due to road fatalities. Two lives were lost in the present case. There are rampant cases involving drivers under the I influence of alcohol or drugs involved in motor vehicle collisions. Finally, the maxim "love thy neighbour and do not injure your neighbour" seems non-existent amongst the road users in our nation these days.

[86] I, therefore allow the appeal by both parties. The conviction and sentence under s. 41(1) are set aside and the acquittal and discharge under s. 44(1) are also set aside.

[87] I hereby order the accused to be retried before another Magistrate on the charges separately.